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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 BEFORE THE HONORABLE EDWARD M. CHEN

CAREN EHRET,)
)
 Plaintiff,)
 vs.)
) Case No. 14-cv-00113 EMC
 UBER TECHNOLOGIES, INC.,)
) San Francisco, CA
) Thursday, August 14, 2014
 Defendant.) 1:36 p.m.
)

TRANSCRIPT OF PROCEEDINGS
 (HEARING ON DEFENDANT'S MOTION TO DISMISS COMPLAINT)
 APPEARANCES:

For Plaintiff:

RAM, OLSON, CEREGHINO & KOPCYNski, LLP
 BY: **MICHAEL FRANCIS RAM, ESQ.**
 555 Montgomery Street - Suite 800
 San Francisco, CA 94111
 (415)433-4949

LAW OFFICES OF HALL ADAMS, LLC
 BY: **HALL ADAMS, III**
 33 North Dearborn Street - Suite 2350
 Chicago, IL 60602
 (312)445-4900

For Defendant:

QUINN, EMANUEL, URQUHART & SULLIVAN
 BY: **ARTHUR MILES ROBERTS, ESQ.**
STEPHEN A. SWEDLOW, ESQ.
 50 California Street - 22nd Floor
 San Francisco, CA 94111
 (415)875-6600

Reported by: *MARGARET "MARGO" GURULE, CSR #12976*
PRO TEM COURT REPORTER, USDC

P R O C E E D I N G S

August 14, 2014

1:36 p.m.

THE CLERK: Please be seated. Calling Case
C14-0113, Ehret vs. Uber Technologies.
Appearances, Counsel.

MR. RAM: Good afternoon, Your Honor. Michael
Ram, for the plaintiff, and may I please introduce my
co-counsel, Hall Adams, from Chicago.

MR. ADAMS: Good afternoon, Your Honor.

THE COURT: All right. Good afternoon, Mr. Adams.

MR. ROBERTS: Good afternoon, Your Honor.

Arthur Roberts, on behalf of Defendant Uber
Technologies, Inc., and with me is Steve Swedlow.

THE COURT: All right. And good afternoon,
Mr. Roberts and Mr. Swedlow.

MR. SWEDLOW: Good afternoon.

THE COURT: All right. Okay. We are on for
defendant's motion to dismiss the amended complaint, and
there are several issues.

Let me just go through the ones quickly that I don't
think need a lot of time, and then focus on the ones that
are -- I think, you know, warrant discussion.

First of all, there is a question of whether the
pleading complies with Rule 9 in terms of the specificity

1 that's required in a case alleging fraud. And I believe
2 that it does meet the standard.

3 It is specific in terms of what the representation is,
4 about the gratuity being automatically added, and therefore,
5 you know, no need to provide gratuity to the drivers. It
6 appears on website, allegedly, and on the app "Uber." It is
7 true.

8 We don't know exactly when the plaintiff may have
9 looked at it. There is an allegation that on September 9th
10 of 2012, plaintiff used the Uber app to arrange a taxi ride
11 to Chicago and paid the 20 percent gratuity. But the
12 importance of Rule 9 is to set forth for the defendant's
13 benefit, in large part, who and what, where, how, how it was
14 fraudulent, et cetera, et cetera, and I think that's been
15 set forth here, with sufficient specificity to give fair
16 notice to the defendant.

17 I know it doesn't have every single detail. There's
18 going to be some factual issues as to, you know, how do you
19 know that there is a factual basis for asserting that the
20 gratuity is not remitted in full and all of that. But
21 that's been clearly teed up, and for pleading purposes, I'm
22 not going to require more.

23 Now, the question of standing under the UCL and the
24 CLRA -- sort of what's the injury here? Where is the loss
25 of money and property, which normally is required. And I

1 think that the issue here that is -- that's at question -- I
2 guess my question to you is: Why isn't that addressed by
3 the *Kwikset* case, the California Supreme Court decision, in
4 *Kwikset* that said the mislabeling of something that is
5 represented to be made in the USA when it is not, which the
6 plaintiff claims was material to it, or him or her, and they
7 wouldn't have bought it otherwise -- and I think there is a
8 similar allegation here that -- and maybe you can correct me
9 if I'm wrong -- that plaintiffs say, "Well, had we known
10 that this gratuity was not all going to the driver, we may
11 not have engaged in this transaction."

12 If they do say that, then it seems to me to be kind of
13 analogous, but you tell me.

14 MR. ROBERTS: I always find it wise to address
15 what the Court is concerned about, so I'll start with the
16 *Kwikset* case. So there are lines of case that the
17 plaintiffs rely on and then lines of cases that -- or a line
18 of cases that the defendant relies on here.

19 *Kwikset* is what I would call a classic
20 benefit-of-the-bargain case, as is the *Kohl's* case, and the
21 reason it's distinguished from the circumstance or the
22 allegations of this case are as follows:

23 If a good is represented of a certain character, like
24 "Made in the USA," that is the quality of the goods. And
25 the benefit of the bargain would be that you purchase a good

1 that satisfies the promise, like "Made in the USA" or a good
2 of a value of \$200 that you were able to purchase for a good
3 of the value of \$100.

4 Now, this is at the pleading stage where we take every
5 allegation in the complaint as true. So whether or not the
6 good is of the quality that was promised, it's more of a
7 fundamental legal question.

8 Here, what was promised, assuming the allegations are
9 correct, is that a metered fare would be charged and an
10 additional 20 percent, gratuity, would also be charged.
11 That's a mandatory charge and fee that was agreed to be paid
12 by the rider or consumer in this case, and it doesn't affect
13 the quality of the good.

14 THE COURT: Why doesn't it constitute a character
15 of what is being sold though? I mean, when you are paying
16 something, you're thinking it's going to be split this way,
17 80 percent here, 20 percent here. In my heart, it makes me
18 happy because I'm the one that -- you know, et cetera, et
19 cetera.

20 I mean, isn't this analogous to laws governing, for
21 instance, how donations to charities work? There are
22 certain laws that say -- I mean, if a charity represented
23 that 90 percent goes directly to the beneficiaries, to, you
24 know, whatever the beneficiary is -- beneficiaries are, and
25 not to overhead and that kind of stuff, and in fact,

1 30 percent goes -- and 70 percent is pocketed or used for
2 overhead. The person still gives the same amount, but it
3 seems to me it makes a difference to the character of what
4 they're giving or getting, at least in the sense of what
5 they think they're giving to, is different.

6 MR. ROBERTS: Right. So I think that is the
7 argument that the plaintiffs make. The difference -- first
8 of all, there is no case that either party has cited that
9 says when a -- when the division of a charitable
10 contribution is misrepresented, you have a claim as the
11 party making the donation, or in this case, the party
12 paying. It's a very distinct claim from using the facts of
13 this case.

14 The party who paid, the consumer, was promised,
15 according to the complaint, to pay a metered fee and
16 20 percent extra, called gratuity. That amount was paid.
17 That's what was agreed to be paid and was paid. And like in
18 *Searle* and *Peralta*, the California courts, the state courts,
19 have determined that, for the UCL and the CLRA, when the
20 total cost is represented correctly -- meaning there was no
21 deception -- where the charge is mandatory, the interest in
22 who gets the money is a curiosity that is not cognizable as
23 a cause of action, meaning whether -- in the *Searle* case, it
24 was whether or not the service charge was given to the
25 service provider or kept by the company. In our case, it

1 would be whether the gratuity is given to the service
2 provider or kept by the company.

3 THE COURT: Well, but part of that turns on the
4 term "service charge" is ambiguous. That could be easily
5 construed as being kept by the provider. I mean, there is
6 no, necessarily, implication or implicit promise or explicit
7 promise it's going to go to the server. It's just a service
8 charge that is added on like any other fee.

9 MR. ROBERTS: Right. And if it wasn't for *Searle*,
10 I would -- I could -- I would understand the argument that
11 that's a question of fact, whether service charge is
12 deceptive or not, meaning was it a promise that the server
13 would get some or not. But what *Searle* held is that, even
14 if that is deceptive, substantively, the interest as to who
15 gets the money between the person providing the service and
16 the company is a curiosity that is not actionable under the
17 UCL.

18 THE COURT: Well, except that's based in part upon
19 the nature of the representation and the labeling of that.
20 Calling it a service charge does not imply any promise to do
21 anything with it; whereas, if you call it a gratuity -- for
22 instance, what if they started charging tax, some kind --
23 they assess some kind of sales tax. Instead of 8 1/2
24 percent, it's represented, well, there is a transportation
25 tax in San Francisco, 22 percent or something like that,

1 when, in fact, there is none, or hotel taxes are overstated
2 consistently against the consumer.

3 You say, Well, a consumer is going to pay that much
4 anyway. It's -- but the representation is that this was for
5 a particular thing and it's going to go to the Government;
6 it's going to be taxed. It's hard to believe that the
7 consumer has no interest in a false or misleading
8 representation as to what that -- the charges are.

9 And that's the thing -- that's the difference about the
10 service charge. That's not a misrepresentation. A service
11 charge is a service charge. It doesn't say it's a tip. I
12 guess some people think it is but --

13 MR. ROBERTS: Well, I don't -- I think it goes
14 beyond what I would need to establish, that anything that
15 you call a fee could or could not be a misrepresentation
16 actionable by the payer. But in this case, because of the
17 existence of *O'Connor*, also before this Court, it presents
18 the stark contrast between whether the payer has a claim for
19 damages for having paid what they agreed to pay, versus the
20 service provider who has a claim for the money that was
21 paid, based on alleged misrepresentation, to receive the
22 gratuity. They are distinct claims. Obviously, on behalf
23 of my client, I disagree with that -- that the plaintiffs in
24 *O'Connor* have a claim, but that's not really what is at
25 issue here.

1 If the service provider or taxi driver has a claim for
2 that 20 percent, then -- let's take the breach of contract
3 claim, for example, then the rider paid exactly what they
4 agreed to pay, and the remedy would be, "Give the money to
5 the taxi driver that you promised to give to the taxi
6 driver, and then we're made whole."

7 In the circumstance where a pretend tax was tacked on
8 that doesn't really exist, the question would be: Does that
9 tax have to be remitted to the entity that you promised to
10 give it to, and is that a claim for the entity, which has
11 been an actual case in the state of Illinois, or does the
12 payer of that tax have the cause of action? It's just a
13 different question. So, here, we're talking about whether
14 the person --

15 THE COURT: Well, the question is whether the
16 consumer who has been charged in -- for such a
17 misrepresented tax has a remedy under the UCL for fraud and
18 misrepresentation, I would think. That's how it works.

19 MR. ROBERTS: Right. That's a straightforward
20 question. But the Court in *Searle* said, Even assuming that
21 the term 'service charge' is deceptive and caused patrons to
22 pay more, that who gets the service charge, even if it's
23 deceptive is not cognizable. It's a curiosity that is not
24 actionable under the UCL.

25 And that's similar to this circumstance where, even if

1 it would hurt the payer's heart that the gratuity was split
2 between Uber and the driver, that doesn't make it a cause of
3 action under the UCL or the CLRA simply because they would
4 prefer that the gratuity all went to the driver instead of
5 the company.

6 THE COURT: So the UC -- so the UCL only addresses
7 hurt of the pocketbook and not hurt of the heart.

8 MR. ROBERTS: Well, in shorthand, yeah, that's our
9 position, which is that if you have a psychological injury
10 where you would like the money to have gone to where it was
11 supposed to go, but you agreed to pay the money, and the
12 service was of the quality that was provided, then you don't
13 have a cause of action. And that's really the distinction
14 between the "Made in the USA" claims or the fictional retail
15 price claims that are cited in the cases in our brief.

16 THE COURT: But about the but-for argument, that
17 but for this representation or this misrepresentation, some
18 of the consumers wouldn't have purchased this ride.

19 MR. ROBERTS: Well, that's -- I think that's --
20 the citation for that is the *Aron vs. U-Haul* case. That
21 is -- was a circumstance where the charge was avoidable. It
22 was a refuel charge that the payer or consumer could either
23 pay or not, and the Court found that to be a distinction and
24 the way it distinguished *Searle* from a mandatory charge. So
25 you can't have gotten the service and the billing that the

1 Uber provided through the taxi company and chose not to pay
2 the gratuity. It was a mandatory charge. Whereas, in the
3 Aron *vs.* U-Haul case, it was an avoidable charge. That was
4 actually what the Court defined as a distinction.

5 In the other circumstance, in the complaint, in our
6 case, it's not a but-for allegation. If it was, we would be
7 in a different circumstance. Paragraph 16 of the complaint
8 says -- although it starts, "But for" -- it says, But for
9 Uber's misrepresentation, plaintiff would not have agreed
10 to or paid Uber the full amount that Uber charged her and
11 that she paid to Uber.

12 That's not possible. That's a fictional world where
13 Ms. Aron could have chosen to pay some smaller portion or
14 not to pay the gratuity because Uber might get some. So if
15 the allegation in the complaint, which it is not -- and I
16 hate to bleed back to the 9(b) point, but we're discussing
17 it so -- it's not a but-for allegation here.

18 It is understandable why it's not a but-for allegation
19 here. Because then the allegation in the complaint for the
20 individual and the class that would be putative are only
21 those people who would not have taken the ride at all and
22 would have taken a different taxi or something else, but for
23 the misrepresentation, alleged misrepresentation.

24 THE COURT: What about that point?

25 MR. ADAMS: Judge, Counsel strikes exactly where

1 Ms. Uber was -- or Ms. Ehret was defrauded. She paid to
2 Uber sums for taxi transportation that she would not have
3 paid to Uber but for it's having misled her about where
4 those portions were to be paid.

5 THE COURT: Well, but it's all or nothing. That's
6 a fictional hypothesis to say, Well, she wouldn't have paid
7 the 20 percent. She could not have avoided -- if her choice
8 were limited -- "I take the ride" or "I don't take the
9 ride," if it had been fully disclosed -- let's say it had
10 been fully disclosed that half of that 20 percent goes to
11 Uber as -- I don't know, a finder's fee or something -- and
12 only 10 percent goes to the driver, if she says, Well, I
13 wouldn't have -- in that case, if it ain't all going to the
14 driver, "I'm not going to that Uber cab. I'm going to take
15 my business to Lyft or somewhere else."

16 Then you have a cause -- then you have a *Kwikset* sort
17 of a thing where there is an economic -- an economic harm.
18 Somebody outlaid money for a product they didn't want to
19 get.

20 MR. ADAMS: Judge, she did have choices. She
21 could have walked out to the curb and hailed a taxicab and
22 paid the meter rate. She could have used some other
23 transportation for hire. Instead she was duped by Uber into
24 using an Uber arranged ride, based on Uber's representation
25 that it would charge her only the metered rate, and it would

1 add this gratuity that would be paid to the driver.

2 THE COURT: Okay. So the question, the but-for
3 question is: Had Uber properly disclosed fully what it was
4 doing with the 20 percent, would she still have gotten into
5 that Uber cab?

6 You don't allege that in here because it said, but for
7 the misrepresentation would not have agreed to pay the full
8 amount. Now, if it said, "Plaintiff would not have
9 purchased the Uber ride," then I think you're squarely
10 within a "but-for," and I think that's an easy case.

11 Here, you're left with more the -- you can't show that
12 economically, there would have been a different outcome;
13 that is, she still would have taken the ride. Not happy
14 about it. She would have still did it. She would have
15 liked to get her money back, but that's not an option.

16 So the harm she suffers at that point is really a
17 misrepresentation as to where -- I don't know if you want to
18 call it psychic harm or an ethical, moral kind of harm that
19 she suffered that she thought the driver was getting paid,
20 and now, at least as far as she's concerned, the driver is
21 getting shortchanged.

22 MR. ADAMS: Judge, following on that theme, we
23 cite a couple of cases in addition to *Aron* where courts have
24 rejected that analysis, have rejected that line of argument
25 for finding no claims under the UCL. One of those is the

1 Johnson case and this recycling fee that was not, in fact, a
2 recycling fee that the plaintiff paid to Walmart. It was
3 just like the so-called gratuity here, additional revenue to
4 Walmart.

5 We cited the *SiriusXM* case where a so-called "royalty"
6 was charged that wasn't the royalty at all. It was a
7 mandatory charge. The plaintiff in that case had to pay the
8 whole royalty, and the Court sustained the UCL claim in that
9 case.

10 THE COURT: Even without a finding of economic
11 harm in the sense of any but-for causation?

12 MR. ADAMS: I think the point of those cases,
13 Judge, is that the Courts did find economic harm in that the
14 plaintiffs were misled into paying this money to Walmart,
15 SiriusXM to U-Haul in the *Aron* case, by this
16 misrepresentation, and that's alleged in our complaint.

17 We allege that Caren Ehret would not have paid the full
18 20 percent, had she not been misled as to it being a
19 gratuity.

20 THE COURT: But could Ms. Johnson, in the Walmart
21 case, have withheld the recycling fee or not paid it
22 somehow?

23 MR. ADAMS: She could not have entered into the
24 transaction at all, just like Ms. Ehret could have.

25 THE COURT: But she didn't have a choice of

1 breaking it up?

2 MR. ADAMS: Correct.

3 THE COURT: All right. Well, then how is that any
4 different, Counsel.

5 MR. ROBERTS: Well, Your Honor, I was just looking
6 in the index of cases in their brief for *Johnson*.

7 THE COURT: It is an unpublished decision, right?

8 MR. ROBERTS: Oh, maybe I'm looking in the wrong
9 spot in the table of contents.

10 MR. ADAMS: It's cited at page 15 of our
11 opposition. And Judge, the one other thing I would say
12 while we're checking our cites and so forth --

13 MR. ROBERTS: Well --

14 MR. ADAMS: -- is I think, Judge, a case that,
15 strangely enough, supports Caren Ehret's theory of having
16 sustained damage here, is that *Searle* against Wyndham case
17 on which the plaintiff -- on which the defendant relies so
18 heavily.

19 And that is where the Court there makes a clear
20 distinction between the service charge and a gratuity. And
21 the Court, in *Searle*, distinguishes gratuity in a way that
22 clearly suggests that, had the guest in that case, been
23 misled into paying gratuity, based upon a
24 mischaracterization of the charge, like we have in our case,
25 the plaintiff would have had a claim under the UCL.

1 MR. ROBERTS: Two points. One, that's not what
2 *Searle* holds. *Searle* holds that some patrons were misled
3 into paying an additional gratuity. And even in light of
4 that misrepresentation and deception, that there is no cause
5 of action because the split of the money between the service
6 provider and the company is one of curiosity.

7 So we have to be careful about what *Searle* actually
8 held. It did distinguish between gratuity and service
9 charge, but not for whether a cause of action exist for the
10 payer as opposed to the recipient, meaning the service
11 provider.

12 Looking back now, I found *Johnson*. *Johnson* is a claim
13 for a nine dollar recycling fee, when you buy a new battery
14 and give them your old battery. So that is -- just like it
15 is in U-Haul -- an avoidable charge because you don't have
16 to give them your old battery.

17 The other case that was cited is the *Walgreen* case.
18 But the allegation in the *Walgreen* case, which is in
19 footnote 8 of the brief is that they would have bought a
20 different juice. That's what -- excuse me -- that's the
21 allegation that the Court doesn't see in the complaint and
22 therefore didn't find valid, meaning the claim wasn't valid.
23 So this is -- whether it's called 9(b) -- or whether it's a
24 particularity point or not, the cause of action under *Searle*
25 and *Peralta* for UCL and CLRA doesn't exist for the payer for

1 determining whether or not the service provider or the
2 company keeps the money. Whether it exists for the service
3 provider as a claim is the issue in *O'Connor*, not in this
4 case.

5 The distinction between the cases cited by plaintiffs,
6 *Aron, Johnson*, and all the other cases, is that when the
7 case, when the charge is not misrepresented as to the total
8 cost -- it's mandatory -- then your interest in who gets the
9 money is a curiosity that is not actionable. When it's an
10 avoidable charge, meaning the company got extra money
11 through the misrepresentation that could have been avoided,
12 then it is actionable because that lie led to the payment
13 of, for example, that nine dollars, or that lie lead to the
14 payment, in the *U-Haul* case, of \$20.

15 THE COURT: Because there is a causation?

16 MR. ROBERTS: Because you lie and say --

17 THE COURT: Because there is a causal relationship
18 there.

19 MR. ROBERTS: Because you can allege, which you
20 have to under the UCL, the three magic things, which is
21 reliance, causation, and damages caused by the reliance.

22 THE COURT: Well, and *Kwik* said -- *Kwikset* does
23 have as its fourth element, quote, "Plaintiffs would not
24 have bought the locked sets otherwise." I mean, that's an
25 indication of materiality, but it also suggests that there

1 has to be some causal relationship to some pocketbook harm.

2 MR. ROBERTS: Because the Court has to be able to
3 make the plaintiffs whole on their theory. And particularly
4 in the context of a putative class, you would be valuing the
5 psychological situation of who got the money between the
6 taxi driver and the company.

7 I mean, we're not at class certification. But that's
8 different than saying, for people who would not have bought
9 a Kwikset lock or given their battery to wherever the
10 batteries went, or bought the juice at Walgreen's, that's a
11 but-for causation that you wouldn't have engaged in the
12 transaction or the part or the transaction that was
13 avoidable, and that's a different required allegation that
14 you could then push throughout the course of the case.

15 THE COURT: Well, let me ask. The monetary remedy
16 under the UCL generally is restitution, correct? You get
17 injunctive relief. You don't get damages. You don't get
18 consequential damages and that sort of thing. It's not a
19 breach of contract?

20 MR. ADAMS: That's correct.

21 THE WITNESS: So how would restitution work in
22 this case? And this also informs the breach of contract
23 claim and everything else that I have been struggling with.
24 How do you get restitution in this case?

25 MR. ADAMS: Judge, from our standpoint, provided

1 with the necessary information, it's relatively simple to do
2 it, and that is that the defendant pays back to its
3 passengers all of the sums that it retained that it
4 characterizes as so-called gratuity for the driver.

5 THE COURT: So it's partial restitution? I mean,
6 normal restitution, you reverse the transaction back to the
7 status quo ante, and you give back what you bought and you
8 get back everything you paid. You can't give back the ride,
9 so you can't -- that's not going to work here. And so
10 you're not entitled to the full refund. Otherwise, you end
11 up with a free ride.

12 So is the next best thing a partial -- basically a
13 partial refund, a refund of the fraudulent portion?

14 MR. ADAMS: Yes.

15 THE COURT: And is there authority for that? Have
16 courts issued restitution where you otherwise can't break it
17 up that way?

18 MR. ADAMS: If you don't mind Mr. Ram addressing
19 that?

20 THE COURT: Sure.

21 MR. RAM: Thank you, Your Honor. I have tried a
22 number of UCL cases. And as the Court knows, there is no
23 jury. It's just tried to the Court; it's all apropos. And
24 the Court, under the UCL -- and we can brief this if the
25 Court would like -- has all sorts of discretionary power to

1 consider whatever the defendant can submit as to what the
2 Court should consider in exercising it's equitable
3 discretion. And part of what the defendant can submit, of
4 course, here, is the value that was received. You know, the
5 Court weighs all of that, and that's not really at the class
6 certification stage. Obviously that's at the trial stage.
7 But the short answer is the Court certainly has the
8 discretion to basically do whatever the Court sees as fair,
9 looking at all of it.

10 THE COURT: Even if it means breaking it up in not
11 a straight restitution of the amount paid but some portion
12 of that. So if it was misrepresented that there was a tax
13 or something, and in fact, there was no tax, or it was
14 overstated by four percent, restitution can obtain with
15 respect to that portion?

16 MR. RAM: Yes, Your Honor. Your Honor can look at
17 whatever equitable factors either side wants to submit and
18 then decide what is fair under all of those circumstances.

19 THE COURT: Partial restitution is within the
20 Court's equitable discretion under the UCL?

21 MR. RAM: Absolutely, Your Honor.

22 MR. ROBERTS: My only response to that would be,
23 so when we get to trial, there is great discretion under the
24 UCL for what the Court can fashion as a remedy. But that
25 can't be used to satisfy the individual plaintiff's standing

1 requirements to have damages proximately caused by the
2 misrepresentation. That part --

3 THE COURT: No, I understand those are two
4 separate inquiries. But I asked because one could argue
5 that one sort of informs the other; that is, if that the
6 Court could, looking down the road, issue partial
7 restitution, that suggests, well, maybe -- even if you had
8 to buy it as a whole -- this is your distinction -- it's not
9 just returning the battery for a recycling fee or opting not
10 to pay, you know, this portion, it's all or nothing. And
11 when it's all, even though a portion of it was fraudulently
12 represented, there is no remedy. But if, in fact, if you
13 look at the tail end, there is a remedy that might be
14 available. I wonder if that suggests the front end -- well,
15 shouldn't somebody have standing, you know, if the remedy
16 and the standing are -- have some kind of alignment?

17 MR. ROBERTS: Right. The problem with -- or my
18 view of the problem with looking at it that way, sort of the
19 ends would justify the means, is that the California state
20 courts in *Searle* and *Peralta* have said, that in this
21 circumstances, there is no action under the UCL.

22 If we just take the facts of *Searle*, where the Court
23 acknowledged that it was fraud -- deceptive to call it a
24 service charge and not informed the person buying the food
25 at the hotel that the service provider was getting all of

1 it.

2 They paid a separate amount of money, meaning some
3 people in that class paid a separate amount of money as an
4 additional gratuity. But the split of the service charge
5 was determined to be a non-actionable curiosity, even if, as
6 you note, the Court could have taken the case and said, "I
7 now can figure out that you paid extra money" -- on average,
8 10 percent extra gratuity -- "that you wouldn't have paid if
9 you knew the service charge was part of that or all of that
10 was going to the service provider."

11 THE COURT: So your reading of *Searle* is that,
12 even if it had been denominated gratuity and not service
13 charge, and further said, "To be paid to the server - don't
14 worry about it," close quote, the outcome of *Searle* would
15 still be the same because it would still be only a matter of
16 mental or emotional curiosity?

17 MR. ROBERTS: Right. That who got the money is a
18 curiosity that could also be deceptive. I wonder whether
19 the people who delivered the food would have a cause of
20 action in the circumstance you have articulated. But that's
21 not the claim being pursued here. It's the person who paid
22 a mandatory amount that they couldn't just pay part of. And
23 as the Court noted in the very first paragraph of the
24 opinion, they could go somewhere outside the hotel and get
25 food. So in that sense, they don't have a cause of action.

1 MR. ADAMS: Judge, if I might say one additional
2 thing about the premise of this whole *Searle*-related
3 argument: that the only damage that Caren Ehret can allege
4 here is a quantifiable economic injury, I think *Searle*
5 rejects that.

6 *Searle* starts its discussion with an extended overview
7 of what tips and gratuities are all about and makes the
8 comment that, quote, "A tip is an entirely gratuitous,
9 entirely subjective, and very personal transaction," close
10 quote. It goes on, near the end of its discussion, to
11 distinguish between that kind of a gratuity and the service
12 charge that was imposed by the hotel in that case.

13 Caren Ehret, in this case, has an interest in what is
14 the disposition of the money that she pays to Uber. She
15 intends that 20 percent be paid to the driver of her taxi as
16 a gratuity that's a very personal decision that she makes as
17 a passenger.

18 Uber does not have a legal right to mislead her into
19 paying more than the metered rate that it assured her it
20 would charge for the taxi transportation service. So the no
21 harm/no foul doesn't wash if you consider what a passenger
22 intends the gratuity to do.

23 THE COURT: All right. Well, let me ask about the
24 CLRA and the claim that you have here. And one of the
25 allegations is that there is a representation as to the

1 characteristics of the services that are being provided.
2 And one of the characteristics here is that, included in
3 that is a 20 percent gratuity. And what is wrong with that?
4 And in the *SiriusXM* case -- that's a District Court case,
5 right, out of New York? Isn't that -- didn't that involve a
6 representation that the defendant was passing through a
7 royalty fee where the actual royalty fee was less. That
8 seems like a case where it's not divisible. It's part of
9 the integrated sum that's paid. So why isn't there a CLRA
10 claim here?

11 MR. ADAMS: Why?

12 MR. ROBERTS: Why isn't there?

13 THE COURT: Why isn't there, yeah.

14 MR. ROBERTS: Well, the CLRA claim is disposed of
15 by *Peralta v. Hilton*, which is a CLRA cause of action that
16 was dismissed for the same reason as *Searle* was ultimately
17 dismissed at the motion to dismiss stage. The *SiriusXM* case
18 that you're referencing, I don't think, was under California
19 law. I'm just looking for it in the brief here.

20 MR. ADAMS: Judge, it was a New York court
21 applying California law.

22 THE COURT: Right, applying Section 70, 85 and 89,
23 I think.

24 MR. ROBERTS: Right. So these were -- I mean, the
25 distinction we would make is that the fee was hidden, as

1 opposed to fully disclosed. And what we state in our brief
2 is that the defendant overcharged for royalty costs that
3 were represented as passed through, meaning the full cost
4 and/or total cost was not presented with no deception.
5 That's really the distinction between *Searle* and *Peralta* and
6 this case, is that when the full cost is presented with no
7 deception, and that charge is mandatory, then you don't have
8 a cause of action as to how the money is split, and that's
9 not the factual circumstance of *Sirius*.

10 THE COURT: What's your response to that?

11 MR. ADAMS: Judge, I'm not sure, frankly, I
12 understand that argument. The cases are directly analogous
13 in the sense that *SiriusXM* characterized this charge as
14 being a passthrough of which it would retain zero.

15 In our case, Uber represented the so-called gratuity as
16 a pass through, of which it would retain zero. They are
17 equally misleading in that respect.

18 MR. ROBERTS: Okay. So just last point,
19 hopefully, on this: That is, as we noted, a Federal
20 District Court in New York who was deciding a CLRA case,
21 which is related to the UCL, I think before *Searle* and
22 *Peralta* were decided by the California State Court. So a
23 court in New York, interpreting California law, should be --
24 the guiding principle should be they should be applying
25 California law as the highest court in California or a court

1 in California would apply it. So if those factors --

2 THE COURT: It's not persuasive authority?

3 MR. ROBERTS: It's not persuasive authority that
4 it predates the holding of *Searle*, which is if the total
5 cost is not misrepresented and the charge is mandatory, the
6 split between who gets it is a curiosity by the payer, which
7 is not to say that somebody else might have claim, meaning
8 the person who was supposed to get whatever money was
9 misrepresented but that the payer doesn't have a claim under
10 the UCL or the CLRA in that circumstance.

11 MR. ADAMS: Judge, as we point out in one of our
12 footnotes, although I don't claim to have mastered all your
13 local rules, our view is that this Peralta case isn't
14 citable. It isn't even good as persuasive authority. It is
15 unpublished, and it predates 2007. And my understanding is
16 that, under your local rules, that makes it not fair game
17 for this Court's consideration.

18 THE COURT: All right. Let me ask -- well, let me
19 just make one final comment on the extraterritorial
20 question. I think there is a debate going on now, and I
21 think several judges on this court have been struggling with
22 the question about extraterritorial application of
23 California law, at least Labor Code stuff in the face of a
24 choice of law provision, and we are still struggling with
25 that. But in this case --

1 (Screams from the hallway.)

2 MR. ROBERTS: Somebody just won the lottery,
3 maybe?

4 THE COURT: I guess. I hope that's what it was.
5 I think the law is pretty clear that, where there is a
6 claim of -- although there is a general presumption against
7 extraterritoriality, that presumption doesn't apply to the
8 UCL and the CLRA where it's claimed that the nonresident was
9 injured by fraudulent misrepresentation disseminating from
10 within California. So you look to where the wrongful
11 conduct occurred, and in that case -- and in this case, you
12 know, that's the claim here, that Uber is based locally,
13 that its website is hosted here, et cetera, et cetera, et
14 cetera. It's that the alleged misrepresentation emanates
15 from California.

16 MR. ROBERTS: Can I briefly respond to that?

17 THE COURT: Yeah.

18 MR. ROBERTS: So we know -- I don't want to bleed
19 into the case management conference, but we, last week,
20 received the initial disclosure documents from plaintiff.
21 And you shouldn't consider facts at this stage for
22 determining extraterritoriality. It's difficult not to
23 consider facts when you're trying to determine where did the
24 misrepresentation emanate. But the distinction between all
25 of the cases cited by plaintiff and the one case, *Sullivan*,

1 that the California Supreme Court decided, is this: when the
2 product, actual product, is made in California and then sent
3 out, or where there is some allegation beyond just a general
4 allegation that all misrepresentations emanated from
5 California, then you're in a different circumstance for the
6 extraterritorial application of the statutory claims. And
7 we're only talking about statutory claims here.

8 The reason why I say that is in *Sullivan*, the 2011
9 California Supreme Court case, with respect to the UCL --
10 here's what the Court said:

11 Neither the language of the UCL, nor its legislative
12 history, provides any basis for concluding that the
13 legislature intended the UCL to operate extraterritorially.
14 Accordingly, the presumption against extraterritoriality --
15 I pronounced that wrong -- applies to the UCL in full force,
16 meaning the presumption would be you don't apply it
17 extraterritorially.

18 If it's sufficient in a complaint to simply say, All
19 the misrepresentations emanated from California because it's
20 a California company, and that means it applies extra -- you
21 apply it extraterritorially, then you can always apply its
22 extraterritorially to a company that's based in California.
23 And the *Sullivan* court specifically addressed that. And
24 what the *Sullivan* Court determined for *Oracle*, which is
25 obviously based in California, is even if the employment

1 decision to not pay employees came from California.

2 The actual important fact was that the non-payment, the
3 thing that should have been paid even if it was decided in
4 California, took place elsewhere. And that's just what
5 happened here.

6 The misrepresentations that are cited come from the
7 Uber-Chicago website. But the non-payment to the driver of
8 the portion of the gratuity that was allegedly due, that
9 driver took place -- we know exactly where -- in Chicago, at
10 4401 North Racine Avenue. So that's where the alleged
11 non-payment took place.

12 And under the California Supreme Court precedent, that
13 means you can't simply say Oracle or Uber makes all of its
14 decisions that are actionable in California, so then you
15 just apply UCL or CLRA to that company because it's
16 California based.

17 THE COURT: So even if the misrepresentation were
18 made here in this state and then disseminated through the
19 Internet, et cetera, throughout the country, that is not
20 enough if the ultimate consummation of that
21 misrepresentation, the harm causing from that -- that flowed
22 from that, i.e., the payment induced thereby --

23 MR. ROBERTS: Or lack of payment.

24 THE COURT: -- or elsewhere, that is too much of
25 an essential component so as to viciate any claim that the

1 fraud occurred here in California?

2 MR. ROBERTS: Yes and no. I mean, I don't think
3 you can -- you could make a broad-based rule, but I don't
4 think you can say you never can apply UCL for -- in other
5 states, or extraterritorially, unless the payment or
6 non-payment occurred in California because not everything is
7 going to be so closely analogous.

8 The *Sullivan* case happened to deal with the failure to
9 pay employees something. That decision was made in
10 California. Other cases that are cited by plaintiffs deal
11 circumstances where the product at issue came from
12 California. It was made in California. So then it was sent
13 outside of California, and California law should apply to
14 that product because it came from California.

15 The analogy in the modern information era is that,
16 without any basis -- because Uber is based in California,
17 the alleged lie that was told in Chicago must have come from
18 California. We know from the documents it didn't actually
19 come from -- it came from Uber-Chicago, which is a separate
20 website from Uber-San Francisco.

21 So we would have to look past the complaint to know
22 that. But to simply make an allegation that you lied and
23 you're California based, so you made up the lie in
24 California, would mean you always apply California law
25 outside of California.

1 THE COURT: All right. Let me hear the response
2 to that.

3 MR. ADAMS: Judge, in this case, specifically in
4 this case, in your complaint that you're being asked to
5 consider, we have alleged that the misrepresentations and
6 omission were made here in San Francisco; originated here in
7 San Francisco; that all the decision-making with respect to
8 them occurred here in San Francisco. There is a not only a
9 choice of law provision in the Uber terms and conditions
10 that provides that California law will apply to the
11 relationship between the parties here. There was a form
12 selection provision that caused us to show up here in the
13 first place.

14 And so you have a circumstance where you have a taxicab
15 passenger in another city who has to come to San Francisco
16 to exercise her rights and to seek relief. She's told that
17 California law has to apply. But Uber argues that even --
18 because it defrauded her while she was in Chicago, Illinois,
19 even though it did that while Uber was operating and
20 communicating its fraud from here in San Francisco, that she
21 has no remedy under California law. That isn't what the
22 cases we have cited hold.

23 THE COURT: What case stands -- is best for the
24 proposition that the place of -- the origins or the
25 misrepresentation in a service case, not in a products case,

1 has, is given the dominant weight?

2 MR. ADAMS: Judge, at page 18 of our opposition
3 brief, we filed -- or we cite several cases in support of
4 the proposition that, particularly where there is a choice
5 of law provision that eliminates this presumption of
6 non-extraterritoriality, that the important facts are those
7 facts regarding where the misconduct was committed, not
8 where the injury occurred. And if you consider those
9 cases -- and we would respectfully suggest that these cases,
10 the *Sullivan* case involving *Oracle*, and this most recent
11 *Lyft* decision involving the California Labor Laws, the wage
12 and hours provisions, are rather an anomaly because of the
13 interplay of those enactments with the UCL that shouldn't
14 control in circumstances that we've alleged in this case.

15 MR. ROBERTS: May I briefly respond?

16 THE COURT: Yes, briefly.

17 MR. ROBERTS: First of all, I don't think *Sullivan*
18 can be called an anomaly because it uses the presumption of
19 non extraterritoriality, applies to the UCL, and it's a
20 California Supreme Court case.

21 But rather than go through *Chavez* and *Mattel* and *iPhone*
22 and all of the cases cited -- you could probably just
23 compare the page cited by plaintiff of their brief with
24 footnote 9 at page 10 and 11 of our brief and then decide
25 for yourself, "Who is characterizing these cases correctly

1 or incorrectly?"

2 With respect to the choice of law provision, I do want
3 to be clear as to what it is Uber has argued in all
4 circumstances. In Chicago, the forum selection clause was
5 enforced to require the case to be filed out here. The case
6 now filed out here, it isn't that no remedy exists.

7 THE COURT: No, you're applying Illinois law.

8 MR. ROBERTS: No. It's that no statutory UCL or
9 CLRA remedy exists, and that's clear from the case law. And
10 I'm reluctant to do this, but I'll cite -- in the case of
11 *Wright*, which Your Honor decided, the whole -- I'll read it.

12 THE COURT: No, I'm familiar with it. And I'm
13 familiar with the interrelationship, and that's what is
14 being reexamined these days in terms of the relationship
15 between the presumption that lies with respect to
16 extraterritoriality or not of California laws like wage and
17 hour laws and a choice of law provision in a prior contract.

18 MR. ROBERTS: Right. The only additional point I
19 was trying to make is, if you choose California law -- so
20 there is a choice -- like in *Gravquick* or like it was
21 discussed in *Wright*, you take that statutory law as it is,
22 meaning, if it doesn't apply extraterritorially and you live
23 outside the state, you don't get it.

24 THE COURT: No, I understand. I understand.

25 MR. ROBERTS: But that's totally different from

1 whether you can bring a common law claim that wasn't statute
2 based for a person who is living in Illinois against a
3 California company. That's not the claim here, and a
4 different analysis would apply because the body of law is
5 saying the UCL and CLRA apply only to California and it
6 doesn't exist for common law. Meaning this isn't trying to
7 get the plaintiff caught in the switches where you have no
8 claim because you have agreed to California law. It's just
9 you don't have a California statutory claim living in
10 Chicago, riding a taxi in California.

11 MR. ADAMS: Nor, Your Honor, under those
12 circumstances, if you accepted the Uber view of that body of
13 law, would this plaintiff have any claim for statutory
14 relief under comparable Illinois enactments that provide
15 consumers like this plaintiff with protections that are
16 intended to be broader than the common law.

17 Uber's argument here would deprive the plaintiff of
18 those statutory remedies that originate either in her home
19 jurisdiction or in this jurisdiction.

20 THE COURT: Why would it deprive -- why would it
21 prevent the application of Illinois statutory laws?

22 MR. ADAMS: This is the Uber argument, that
23 because California law applies, based on its choice of law
24 provision, that the plaintiff --

25 THE COURT: I thought the argument is that

1 California law does not apply; that the choice of law
2 incorporates a territorial limit, and therefore any attempt
3 to apply California law is nullified or is nonexistent and
4 does not provide the application of some other territorial
5 law.

6 MR. ROBERTS: Right. Or California common law --
7 I guess I don't want to make an argument that is not at
8 issue, meaning there isn't those other claims -- I said it
9 without the plural. There aren't those other claims in this
10 complaint. So what we might argue, if a different cause of
11 action was pled, I don't know. I would have to research it
12 to figure out what my answer to that would be.

13 THE COURT: All right. Let's -- obviously I have
14 to rule on these issues, so I'm wondering how much sense it
15 makes to go forward trying to start setting dates and thing
16 because some of these are -- if I were to grant your motion,
17 what's left?

18 MR. ROBERTS: Nothing, as long as I get to
19 articulate the breach of contract argument that we're going
20 to make.

21 THE COURT: Well, I have that. I have to move on.
22 If I were grant your motion in total, there wouldn't be
23 any -- nothing to schedule?

24 MR. ROBERTS: There would be nothing to schedule
25 and if plaintiffs chose to file a different --

1 THE COURT: Except for leave to amend, and that's
2 an if.

3 MR. ROBERTS: Right.

4 THE COURT: So the question is whether it makes
5 sense to start setting dates for discovery cutoff and
6 discussing this question of bifurcation or not and dates for
7 class cert until we get past this front door, which, you
8 know, I think I have to deal with here.

9 MR. ROBERTS: And being hopefully optimistic, at
10 least keeping the chance open that we might win, that would
11 be our preference. And it isn't as if -- we can become back
12 whenever you tell us to come back and set the schedule. So
13 it isn't as if we're gone forever if we walk away today
14 without a schedule leading up to class cert or trial.

15 THE COURT: I think what I would like to do is set
16 a further status in, let's say, three weeks, and give me
17 enough time then to rule on these matters. We can come back
18 here and then see what we've got and then set dates
19 according to that.

20 And my intention is, if this case is going to proceed,
21 I'm going to, you know, set down some dates and put this on
22 a reasonable fast track.

23 MR. ROBERTS: And so we will just wait to do
24 anything until then?

25 THE COURT: I think that's what I would like to do

1 is set -- defer the status conference out for three weeks,
2 if I'm here. I'm assuming I'm here.

3 THE CLERK: That would be September 11th, Your
4 Honor.

5 THE COURT: And that will be at --

6 THE CLERK: 10:30.

7 THE COURT: -- 10:30. And that will give me a
8 timeline within which to resolve these questions.

9 MR. ADAMS: Thank you very much for your time.

10 THE CLERK: Would you like a status report?

11 THE COURT: Yeah, a week before, or let's say
12 three days before the hearing. Okay?

13 MR. ROBERTS: Okay.

14 (Hearing concluded at 2:29 p.m.)
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REPORTER'S CERTIFICATE

* * *

I, MARGO GURULE, a Pro Tem Certified Shorthand Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: August 28, 2014



MARGARET "MARGO" GURULE
CSR No. 12976